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Before **DOCKET FILE COPY ORIGINAL**
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
)
Petition of Bell Atlantic Telephone)
Companies for Forbearance from Regulation)
as Dominant Carriers in Delaware;)
Maryland; Massachusetts; New Hampshire;)
New Jersey; New York; Pennsylvania;)
Rhode Island; Washington, D.C.; Vermont;)
and Virginia)

CC Docket No. 99-24

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COMMENTS OF
HYPERION TELECOMMUNICATIONS, INC.

Hyperion Telecommunications, Inc. ("Hyperion"), by its counsel, hereby submits its Comments opposing the Bell Atlantic Telephone Companies' ("Bell Atlantic") Petition in the above-referenced docket requesting that the Commission forbear from regulating its special access services.

This docket concerns the latest in a series of RBOC petitions requesting that the Commission forbear from regulating RBOC special access services. In this Petition, Bell Atlantic requests that it be granted pricing flexibility which, among other things, would allow it to file special access rate changes on one day's without any cost justification requirements. Bell Atlantic makes no effort to demonstrate, on a market-by-market basis, that its special access services are subject to competition – rather, it simply states that special access services in all of its states are subject to competition generally. Furthermore, Bell Atlantic fails to explain why forbearance is warranted when it has not yet complied with the market opening provisions of the Act. Section 10 of the Act states that the Commission shall forbear from applying any regulation or provision of the Act to a telecommunications carrier where enforcement of such regulation or provision is: 1) not necessary

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to ensure that the charges and practices of that carrier are just and reasonable; 2) not necessary for the protection of consumers; and 3) forbearance is consistent with the public interest. Bell Atlantic's Petition utterly fails to satisfy Section 10's forbearance test, and accordingly must be rejected.

The fact that Bell Atlantic requests such sweeping relief magnifies the dearth of its attempted justification to be excused from regulation of its special access services in every state in which it operates. Bell Atlantic makes no effort to demonstrate, as it could not, that it has taken the necessary steps to comply with the market opening provisions of the Act, or that its market share has been significantly diminished by competition. At least some of the other RBOC petitions filed to this point attempted to give the appearance that they were narrowly tailored to address the RBOC's competitive position in particular markets. For example, Ameritech asked the Commission to forbear from regulating its special access services in Chicago, Illinois, and US WEST in Seattle, Washington. Bell Atlantic has gone one step further and abandoned any attempt to make a specific showing that the level of competition in certain of its markets warrant regulatory forbearance of its special access services. Rather, Bell Atlantic fabricated a market "addressability" concept that does not even purport to assess the competitive landscape on a market-by-market basis. In any case, it is completely unrelated to any standard the Commission has utilized in the past in assessing market power.

Bell Atlantic would also have this Commission roll up ongoing consideration of many important competitive issues into one summary proceeding. Bell Atlantic is well aware that the Commission recently decided that incumbent LEC DSL services are special access services, and are

subject to the interconnection and unbundling obligations of the Act.^{1/} Ongoing proceedings are further underway to address a variety of related issues, including whether RBOC's can avoid these obligations by provisioning DSL services through separate affiliates. Bell Atlantic's Petition, however, requests regulatory forbearance from *all* of its special access services, and thus by its terms encompasses DSL services as well. In view of the regulatory activity addressing incumbent LEC DSL services, and proceedings underway specifically designed to consider these issues, it is not appropriate for the Commission to consider Bell Atlantic's request for forbearance with respect to these services. Bell Atlantic either completely overlooked this issue, or its Petition is a disingenuous attempt to circumvent these recent orders and proceedings.

Bell Atlantic has taken every opportunity to hinder the development of local exchange competition in its states. It now asks the Commission to deregulate its special access services, ostensibly to enable it to better compete. The Commission should take this opportunity to make clear that neither Bell Atlantic nor any other incumbent LEC will be afforded any relaxed regulatory treatment until such time as they comply with the market opening provisions of the Act. The Commission has taken a similar approach in its *Access Reform Proceeding*.^{2/} In that proceeding, the

^{1/} *In the Matter of GTE Telephone Operating Cos.*, CC Docket No. 98-79, Memorandum Opinion and Order (rel. Oct. 30, 1998).

^{2/} *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, Usage of the Public Switched Network by Information Service and Internet Access Providers*, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, CC Docket Nos. 96-262, 94-1, 91-213, 96-263, 11 FCC Red 21354 (1996) ("Access Reform Proceeding").

Commission envisioned a phased approach to pricing flexibility in which some pricing flexibility could be granted to incumbent LECs when they have demonstrated that they have opened their markets to competition, measured by reference to some standard. Later, when actual competition develops, as evidenced by some significant decrease in market share, additional pricing flexibility could be granted – possibly even up to a level of regulatory forbearance akin to the relief requested by Bell Atlantic in this proceeding. The Commission should employ similar reasoning here. Bell Atlantic should not be afforded relaxed regulatory treatment until it has fully opened its markets to competition and further demonstrates the existence of substantial competition. Complete regulatory forbearance may be warranted only when Bell Atlantic no longer exercises market power.

Bell Atlantic has not demonstrated any of the factors that the Commission has traditionally considered in assessing market power. These include the nature of the barriers to market entry, the ability to influence market price, supply capabilities of competing participants including the availability of reasonably substitutable services, the number and financial strength of competing participants, the relative power of purchasers, whether a firm controls bottleneck facilities, and the movement of market share over time.^{3/} In applying these factors it becomes clear that Bell Atlantic is a dominant carrier in the special access market. Bell Atlantic concedes as much in its Petition.^{4/}

^{3/} See *In the Matter of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, CC Docket No. 79-252, Order, 11 FCC Red. 3271 (1995).

^{4/} *Bell Atlantic Petition* at 3 ("[b]ecause Bell Atlantic does not request classification as a nondominant carrier in this petition, Bell Atlantic does not here request either mandatory or permissive detariffing of its special access services.")

As long Bell Atlantic exercises market power, continued regulation is critical to ensure that its rates are just and reasonable. Thus, Bell Atlantic's Petition fails to satisfy the first criterion of Section 10's forbearance test. Furthermore, since the potential for Bell Atlantic's anti-competitive pricing practices must be constrained, it follows that grant of pricing flexibility at this time would fail to protect consumers. Moreover, Bell Atlantic has not articulated any cognizable reason why forbearance would be in the public interest. In short, no regulatory forbearance is warranted under Section 10 until such time as Bell Atlantic is in fact declared by the Commission to be a nondominant carrier, and the potential for market abuses is dissipated.

CLECs currently face substantial barriers to market entry, since Bell Atlantic is a dominant local exchange carrier with control over many of the facilities necessary for CLEC provisioning of special access services. As Bell Atlantic notes in its Petition, the most common form of special access involves CLEC collocation in Bell Atlantic central offices for the purpose of establishing a dedicated line to an interexchange carrier's ("IXC") point of presence. Collocation is an area of great concern for CLECs, as collocation costs are exorbitant, and the time it takes to collocate equipment in Bell Atlantic's central offices is excessive. These issues are currently the subject of proceedings before the Commission. Bell Atlantic's arguments are even less convincing with respect to its resold special access services, as slight margins and poor quality service have relegated resale to a guaranteed money loser, rather than a long term competitive alternative. Bell Atlantic's market dominance is even more apparent in the case of DSL services, as Bell Atlantic has bottleneck control over the loops and collocation space necessary to provision such services. Until these issues are

resolved, competitors will continue to rely on Bell Atlantic's facilities and services to provision special access services.

In attempting to show that it lacks market power over special access services, Bell Atlantic references a study performed by Quality Strategies, whose conclusions are unavailing in determining whether viable competitive alternatives exist in specific Bell Atlantic markets. Although Hyperion cannot comment on this study, since it was not attached to the Petition, its flaws are readily apparent from the context of the Petition. Quality Studies applied a concept known as market "addressability" to special access services in Bell Atlantic's region, and determined that competitors can "address" the majority of Bell Atlantic's special access market. By any meaning, Bell Atlantic's ubiquitous market share is not "addressable." Bell Atlantic makes no attempt to show that its market share has significantly been diminished in any particular market, or that reasonably substitutable services are available in a specific area. Rather, Bell Atlantic makes the sweeping and unsupported statement that all of its special access services in every state in which it operates could be provided by some other carrier if Bell Atlantic were to charge unjust or unreasonable rates. This "could be provided by" standard is useless in assessing Bell Atlantic's market dominance, and is not among the criteria traditionally employed by the Commission in assessing market power.

Bell Atlantic cites the *Hyperion Forbearance Petition*^{5/} as if it supports Bell Atlantic's request for relief in this proceeding, when in fact it stands for the opposite proposition. In that case,

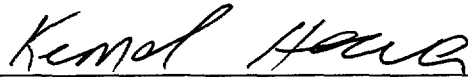
^{5/} *In the Matters of Hyperion Telecommunications, Inc. Petition Requesting Forbearance*, 12 FCC Red 8596 (1997).

the Commission held that competitive access providers by definition cannot exercise market power, since they compete against the dominant incumbent LEC, whose rates set the tone for the market. *Hyperion Forbearance Petition* at ¶ 23. Bell Atlantic's size and resources dwarf those of its competitors, and the potential for abuse is significant if Bell Atlantic were to be granted pricing flexibility. There are no procedural mechanisms to protect against Bell Atlantic subsidizing its special access services with revenues derived from other services over which Bell Atlantic undisputedly maintains market dominance. Bell Atlantic certainly has offered no assurances to dispel this threat. Even with this threat, the regulatory requirements placed on Bell Atlantic are minimal, as it can currently file special access tariff revisions on seven days' notice with only the minor cost justification required to support its special access rate changes. It is unclear why this would represent an onerous burden on Bell Atlantic, and is unlikely to affect Bell Atlantic's ability to compete. Rather, these requirements are more properly viewed as legitimate procedural safeguards to ensure that competitors have at least some opportunity for meaningful review of Bell Atlantic's service offerings prior to them taking effect.

Conclusion

For the foregoing reasons, Hyperion Telecommunications, Inc. urges this Commission to deny Bell Atlantic's Petition for forbearance, and make clear that no such relief will be granted until Bell Atlantic complies with the market opening provisions of the Act.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of March, 1999, a copy of the foregoing Comments of Hyperion Telecommunications, Inc. in CC Docket No. 99-24 were served by hand delivery or first-class mail on the following active parties:

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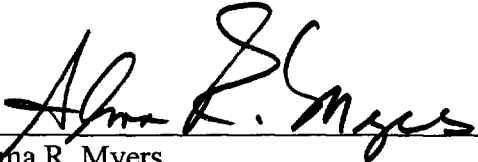
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